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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 v.

15 LOUIS V. SCHOOLER and FIRST
16 FINANCIAL PLANNING
CORPORATION, dba Western
Financial Planning Corporation,

17 Defendants.
18

Case No. 3:12-cv-2164-GPC-JMA

**ORDER GRANTING IN PART
MOTION FOR STAY AND
DENYING REQUEST FOR ORAL
ARGUMENT**

(ECF NOS. 495, 496)

19 This is a civil enforcement action initiated by the Securities and Exchange
20 Commission ("Commission"), in which the Commission alleges defendants Louis V.
21 Schooler ("Schooler") and First Financial Planning Corporation d/b/a Western
22 Financial Planning Corporation ("Western") defrauded investors through the sale of
23 unregistered securities tied to interests in real property.

24 On August 16, 2013, the Court granted in part and denied in part Defendants'
25 Motion to Modify Preliminary Injunction Order, in which Defendants requested that
26 the Court remove the GPs from the receivership estate. (ECF No. 470.) In ordering
27 that the GPs should be removed from the receivership estate, the Court imposed certain
28 conditions on their removal, including the following condition:

[T]he Court first orders a pro rata reduction of Western's equity interests in the GPs according to the properties' current fair market value as set forth in the appraisals obtained by the Receiver. To the extent a GP account has a zero balance or insufficient funds to meet an obligation due within ninety days from the date of the reduction of Western's interests, such interests shall nonetheless be formally liquidated with no payment to Western. Before the GPs are released from the receivership, all of Western's equity interests in the GPs shall be liquidated to ensure that Western will have no future responsibility for any liability incurred by the GPs. Additionally, given the enormous disparity between the purchase prices of the GP properties and the funds Western raised from the GPs, the Court finds it equitable to preclude Western from receiving a share of any proceeds received from any future sale of the GP properties.

("Liquidation Condition") (ECF No. 470 at 25-26.)

The Court thereafter denied Defendants' Motion for Partial Reconsideration of the Order Granting in Part and Denying in Part Defendants' Motion to Modify Preliminary Injunction Order. (ECF Nos. 474, 494.)

Defendants then appealed the Liquidation Condition of the Court's August 16, 2013 Order. (ECF No. 499.)

Before the Court is Defendants' Motion for Stay of Order Pending Appeal, (ECF No. 495), along with Defendants' Request for Oral Argument, (ECF No. 496). The Receiver and the Commission have each filed a response in opposition to the Motion for Stay. (ECF Nos. 509, 510.) The Court finds Defendants' Motion for Stay suitable for disposition without oral argument. See CivLR 7.1.d.1.

The crux of Defendants' Motion for Stay is that, if the Receiver is allowed to proceed with the liquidating Western's interests in the GPs before the Ninth Circuit rules on Defendants' appeal, Western will irreparably harmed without due process. More specifically, Defendants assert Western will be "permanently stripped of at least \$11 million of assets and likely millions of dollars of future investment returns before the underlying claims have been tried," and that "[l]iquidating the equity interests at this time will unalterably change the status quo before the case on the merits can be heard, to the benefit of none of the parties or the investors."

In response, the Receiver argues Defendants' Motion for Stay should be denied because "Western is not being deprived of property or ordered to disgorge assets," but

1 is instead being required to convert its equity interests into their fair market value in
2 cash as determined by the best evidence available, to wit, the appraisals obtained by the
3 Receiver. The Receiver notes Defendants have offered no evidence supporting their
4 assertion that Western's equity interests "are worth anything remotely close to \$11
5 million."

6 The Receiver asserts that, just as this Court had the power to order the
7 sale/liquidation of Western's vehicles, gold coins, office furniture and equipment, this
8 Court had the power to order the conversion of Western's equity interests into cash.

9 The Receiver further contends that imposing a stay that would allow Western to
10 retain its interests in the GPs while releasing the GPs from the receivership "would
11 harm the receivership estate and those with claims to recover from it" because of the
12 responsibility Western would share for liabilities incurred by the GPs.

13 The Receiver argues "[t]he most important public interest at issue here is
14 preserving and protecting Western's assets for the benefit of those with claims to
15 recover from the estate," which interest will be put at risk "simply to preserve
16 Defendants' fantasy that [Western's equity interests] are worth anything remotely close
17 to \$11 million."

18 The Receiver finally asserts "[t]he real reason Defendants sought partial
19 reconsideration, filed the appeal, and brought this motion for stay is not to save
20 hopelessly underwater investments." The Receiver contends that, "[s]ince the Court
21 rejected his attempt to have Western removed from the receivership last November, Mr.
22 Schooler (with his team of lawyers and substantial personal resources) has
23 systematically done everything in his power to ensure, regardless of the Court's orders
24 on fee applications, there are no funds available to pay the Receiver and his counsel."
25 The Receiver argues "[t]he Court should see this for what it is – a tactic to impede the
26 receivership – and reject this further attempt to circumvent the Court's orders and
27 prevent the Court from being able to compensate the Receiver for his work."

28 The Commission asserts in response that it "does not oppose a stay in principle,

1 but strongly opposes one that it limited in the way defendants propose.” The
2 Commission argues that, if the Court imposes a stay, it should apply to both the
3 Liquidation Condition and the GPs’ release from the receivership. The Commission
4 then argues a stay is not required in the first place because Defendants have not
5 satisfied the requirements under Federal Rule of Civil Procedure 62(c) for obtaining
6 a stay.

7 In reply, Defendants argue they are likely to prevail on their appeal because the
8 Court ordered the Liquidation Condition based on case law involving post-judgment
9 disgorgement and because no judgment has been rendered in this case. Defendants
10 argue Western is likely to be irreparably harmed because it will receive no proceeds
11 from GPs that do not currently have enough money to pay their upcoming bills and
12 because the Court’s order comes at a time “when property values have bottomed out,”
13 meaning Western will be deprived of its “investment-backed expectations.”

14 Defendants further argue that a stay of the Liquidation Condition would not
15 harm investors because “the GPs will still be responsible for all the same ongoing
16 obligations they have under the partnership agreements.” Defendants assert that, “if
17 Western retains an ownership interest, it will remain financially responsible for making
18 payments and contributions to the GPs as needed.” (ECF No. 512 at 10 (emphasis
19 added).) Defendants argue that any risk to Western of joint and several liability for the
20 GPs’ debts and liabilities has always existed and that “Western’s ownership interest
21 carries the obligation under the Partnership Agreement to make contributions as
22 needed.”

23 Courts consider four factors in determining whether to issue a stay pending
24 appeal under Rule 62(c):

25 (1) whether the stay applicant has made a strong showing that he is likely
26 to succeed on the merits; (2) whether the applicant will be irreparably
27 injured absent a stay; (3) whether issuance of the stay will substantially
injure the other parties interested in the proceeding; and (4) where the
public interest lies.

28 Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Golden Gate Rest. Ass’n v. City &

1 Cnty. San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008). The second and third
 2 factors require, in essence, a balancing of hardships. See SEC v. Goldfarb, 2013 WL
 3 4865144, at *2-3 (N.D. Cal. Sept. 12, 2013).

4 **1. Likelihood of Success on the Merits**

5 “The Power of a district court to impose a receivership or grant other forms of
 6 ancillary relief . . . derives from the inherent power of a court of equity to fashion
 7 effective relief.” SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980). The “primary
 8 purpose of equity receiverships is to promote orderly and efficient administration of the
 9 estate by the district court for the benefit of creditors.” SEC v. Hardy, 803 F.2d 1034,
 10 1038 (9th Cir. 1986).

11 “Congress has authorized federal receivers to exercise broad powers in
 12 administering, retrieving, and disposing of assets belonging to the receivership.” SEC
 13 v. Ross, 504 F.3d 1130, 1145 (9th Cir. 2007) (emphasis added). Indeed, “the power
 14 of sale is within the scope of a receiver’s ‘complete control’ over receivership assets.”
 15 SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1144 (9th Cir. 1996), abrogated on other
 16 grounds by Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83 (1998). When a sale
 17 of receivership assets is ordered by the court, the assets should be sold at the “best price
 18 under the circumstances.” Goldfarb, 2013 WL 4865144, at *2 (quoting Tanzer v. Huffines,
 19 412 F.2d 221, 222 (3d Cir. 1969)).

20 “A district court’s power to supervise an equity receivership and to determine
 21 the appropriate action to be taken in the administration of the receivership is extremely
 22 broad.” SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005). A
 23 district court’s supervisory decisions are reviewed for an abuse of discretion. Id. And
 24 the Ninth Circuit has observed that it “should not place itself in the position of second
 25 guessing a district court judge . . . particularly when there appears to be no clear abuse
 26 of discretion.” Hardy, 803 F.2d at 1037-38.

27 Here, despite Defendants apparent acquiescence to the Court’s prior orders
 28 authorizing the Receiver to sell Western’s vehicles, gold coins, and office

1 furniture/equipment, the Court finds Defendants argument that the Liquidation
2 Condition will infringe Western's due process rights to be reasonable. Still,
3 Defendants provide no support for their assertion that Western will be deprived of
4 assets worth \$11 million. To the contrary, the best evidence of the current fair market
5 value of Western's interests in the GPs is found in the appraisals obtained by the
6 Receiver. Thus, it is unclear whether the Liquidation Condition deprives Western of
7 any significant property interest.

8 Furthermore, Defendants actually confirm that Western is legally tied to the GPs
9 in a way that means Western "will remain financially responsible for making payments
10 and contributions to the GPs as needed." Thus, Defendants do little to assuage the
11 Court's primary concern for imposing the Liquidation Condition, i.e., to protect the
12 receivership estate from any future liability incurred by the GPs. In short, the Court
13 finds this factor weighs slightly in favor of a stay.

14 **2. Balance of Hardships**

15 On one hand, Western may not be able to share in the proceeds, if any, from the
16 future sale of any GP property, and a stay may, depending on the Ninth Circuit's ruling,
17 preserve Western's right to share in any such proceeds. On the other hand, it is
18 uncertain whether the GPs will be able to and/or want to maintain their mostly
19 underwater interests in the GP properties without losing them to foreclosure or
20 deciding to dispose of their properties in short sales. Also uncertain is whether the GPs
21 will ever net anything from a sale of their property interests in the first place. Thus,
22 whether Western would ever benefit from its equity interests in an amount greater than
23 the current value of those interests is unknown.

24 More certain is that, as set forth in this Court's prior orders, Western would
25 likely be jointly and severally liable for any liability incurred by the GPs so long as
26 Western maintains an interest in the GPs. And, as Defendants provide, Western
27 apparently has a continuing obligation to fund the GPs under the partnership
28 agreements.

1 Once the GPs are released from the receivership, the litigation stay protecting
2 the GPs will be lifted, and neither the Court nor the Receiver will have the authority
3 to protect Western from liability incurred by the GPs. This risk runs counter to the
4 Court's duty to oversee the protection of Western and its assets.

5 Still, the likelihood of the GPs incurring liability for which Western may be
6 responsible is unknown. Further, it is unlikely that the Commission or its case against
7 Defendants would be harmed by a stay. The Court thus finds the uncertainty attached
8 to the litigants' potential hardships tips in favor of a stay.

9 **3. Public Interest**

10 Generally, there is a strong public interest in honoring the due process rights of
11 litigants. Here, however, there is also a strong public interest in ensuring the GPs are
12 fully separated from Western in order to protect the receivership estate for the benefit
13 of Western's creditors, which may include investors depending on the outcome of this
14 case. Because the GPs currently remain in the receivership, they are protected from
15 litigation by third parties. If the GPs were released from the receivership before being
16 fully separated from Western, Western would face liability for any obligations incurred
17 by the GPs. The Court thus finds the public interest weighs against a stay of only the
18 Liquidation Condition.

19 Having considered the foregoing factors, the Court finds a stay of the
20 Liquidation Condition is appropriate. But because it is a condition to the GPs' release
21 from the receivership, the Court must stay the entire August 16, 2013 Order with regard
22 to releasing the GPs from the receivership. The Court will thus grant in part
23 Defendants' Motion for Stay.


24 Once Defendants' appeal of the Liquidation Condition is resolved, the Court will
25 direct the Receiver to take the steps outlined in the Court's August 16, 2013
26 Order—with or without the Liquidation Condition depending on the Ninth Circuit's
27 ruling—for the release of the GPs from the receivership.

28 Having considered the parties' submissions, the record in this matter, and the

1 applicable law, **IT IS HEREBY ORDERED** that:

- 2 1. Defendants' Motion to Stay, (ECF No. 495), is **GRANTED IN PART**;
- 3 2. The Court's August 16, 2013 Order is **STAYED** with regard to the release
4 of the GPs from the receivership pending the outcome of Defendants'
5 appeal;
- 6 3. Defendants' Request for Oral Argument, (ECF No. 496), is **DENIED**; and
- 7 4. The hearing on Defendants' Motion for Stay, currently set for November
8 15, 2013, is **VACATED**.

9 DATED: November 14, 2013

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11 HON. GONZALO P. CURIEL
12 United States District Judge
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